BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN HINDS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,822
EXCELLENCE IN DRYWALL	)	
Respondent	)	
AND	)	
	)	
CHARTER OAK FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the June 7, 2012 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

APPEARANCES

Claimant appeared by and through his attorney Gary K. Albin, of Wichita, Kansas. Respondent appeared by and through its attorney William L. Townsley, III, of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the same record as the ALJ, comprised of the transcript of the Motion Hearing held on April 5, 2012, with attached exhibits and the transcript of Preliminary Hearing held on May 24, 2012, with attached exhibits, and the documents filed of record with the Division in this matter.

ISSUES

In his Order of June 7, 2012, the Administrative Law Judge (ALJ) ordered respondent to provide claimant with authorized medical treatment, and ordered TTD to be paid commencing February 2, 2012 and continuing until released or accommodated. The ALJ also found that the drug tests performed in the course of claimant's treatment do not

suffice to prove respondent's intoxication defense. The ALJ went on to find that the past provided medical treatment is to be paid as authorized. He declined to order further testing outside the scope of that treatment to prove or disprove the respondent's defense.

The respondent requests review of whether it is entitled to obtain drug confirmation testing from a positive test sample obtained in the course of regular medical treatment pursuant to K.S.A. 44-501(b). Respondent further argues that claimant's refusal to submit to additional testing violates the provisions of K.S.A. 2011 Supp. 44-501(b)(1)(E) and all benefits under the Kansas Workers Compensation Act (Act) should be forfeited.

Claimant argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed and remanded.

Claimant was employed by respondent as a sheetrock hanger. His first day on the job with respondent was February 21, 2012. The record indicates that respondent had used claimant as a subcontractor in the past. Claimant was to work 40 hours per week and was being paid $18.00 per hour. On the first day claimant worked for respondent he was working on a scaffold. Claimant fell from the scaffold, striking his head and was injured. Respondent attempted to ascertain if claimant had suffered a serious injury. Claimant initially presented as being in good health and was allowed to go home after the fall. However, respondent sent another employee with claimant in order to keep an eye on him. Claimant later became combative and was taken to the hospital by ambulance. Tests performed at Via Christi Hospital confirmed that claimant had suffered a fractured skull and a right frontal subdural hematoma. Claimant was prepped for and underwent immediate emergency surgery, consisting of a right craniotomy.

Due to the nature of claimant's injuries, a multitude of lab tests were performed including a urinalysis. The results of the urine drug screen indicated claimant tested positive for Benzodiazepine of at least 220 ng/ml and Cannabinoids of at least 50 ng/ml. However, the testing performed by the hospital, while done in the normal course of treating the claimant, included only tests using qualitative screening procedures. The more specific gas chromatography-mass spectroscopy (gc/ms) test specified by K.S.A. 2011 Supp. 44-501(b)(3)(D) was not performed and the hospital refused to proceed with the test without claimant's permission or a court order.

Respondent then filed an Ex Parte Motion For Drug Testing (claimant was unrepresented at this time) on March 2, 2012, requesting the authority to collect a second urine sample from claimant and the authority to proceed with the gc/ms testing on each sample. The ALJ, in an order dated March 2, 2012, denied respondent's request for the collection of a second sample, but ordered the preservation of the original sample. No

decision was made at that time on respondent's request to perform the additional gc/ms testing on the original sample.

Claimant's attorney entered his appearance on March 21, 2012. Shortly thereafter, on March 26, 2012, respondent filed a Motion For Confirmation Drug Testing, requesting that the original urine sample be provided for the purpose of completing the gc/ms testing required by the statute. Respondent's Motion, along with issues raised by claimant with the filing of his E-3 Application For Preliminary Hearing, went to hearing before the ALJ on May 24, 2012. The ALJ then issued the appealed Order of June 7, 2012, which is before the Board at this time.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501(b)(1)(C)(D) states:

> (C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
>
> Confirmatory test cutoff levels (ng/ml)
>
> Marijuana metabolite[1] 15
> Cocaine metabolite[2] 150
> Opiates:
> Morphine 2000
> Codeine 2000
> 6-Acetylmorphine[4] . . . . . 10 ng/ml
> Phencyclidine 25
> Amphetamines:
> Amphetamine 500
> Methamphetamine[3] 500
>
> [1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
> [2] Benzoylecgonine.
> [3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
> [4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.
>
> (D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

K.S.A. 2011 Supp. 44-501(b)(2)(B) states:

> (B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

K.S.A. 2011 Supp. 44-501(b)(1)(E) states:

> (E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

Claimant presented to the Via Christi Emergency Room with what would prove to be a significant head injury. In the normal course of its business, the hospital elected to take a urine sample, apparently with the health and welfare of claimant in mind. This was not at the direction of respondent. The preliminary test verified at least 50 ng/ml of Cannabinoids was present in claimant's system. K.S.A. 2011 Supp. 44-501(b)(1)(C) sets the confirmatory test cutoff level at 15 ng/ml. However, the more specific gc/ms test was not performed by the hospital, absent either claimants approval or a court order. Claimant refused to allow the testing and the ALJ would not order the more sensitive, statutorily required test.

K.S.A. 2011 Supp. 44-501(b)(3) states:

> (3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:
>
> (A) The test sample was collected within a reasonable time following the accident or injury;
>
> (B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
>
> (C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
>
> (D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;
>
> (E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and

> (F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

Respondent contends that claimant's objection to a statutorily required chemical test is tantamount to a refusal. Under K.S.A. 2011 Supp. 44-501(b)(1)(E) this can result in a forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of drugs by the claimant.

K.S.A. 2011 Supp 44-518 states:

> If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

Claimant's objection to the testing which is required by statute before the results can be admitted into evidence is also dangerously close to being a refusal to submit to an examination requested by the respondent. Under K.S.A. 44-518, a claimant's right to benefits may be suspended if an employee refuses to submit to an examination.

This Board Member notes that, even though K.S.A. 2011 Supp. 44-501(b)(1)(E) was raised by respondent at the April 5, 2012 preliminary hearing[1], the ALJ never addressed the issue of claimant's refusal to allow the more specific testing in any of his subsequent orders. This Board Member finds that this matter should be remanded to the ALJ for a determination of the applicability of either K.S.A. 2011 Supp. 44-510(b)(1)(E) or K.S.A. 44-518 to the facts in this case.

The ALJ does not have jurisdiction over the hospital, Via Christi. The ALJ cannot order Via Christi to perform the re-test of the blood sample using the statutorily required method. The ALJ does, however, have jurisdiction over the claimant. The ALJ can order the claimant to provide the authorization and consent required by Via Christi to perform the re-test of the original sample.

---

[1] P.H. Trans. (Apr. 5, 2012) at 9.

Claimant is hereby ordered to do so. Failure to provide respondent with such a consent shall result in either a suspension of compensation under K.S.A. 44-518 or dismissal of the claim pursuant to K.S.A. 44-501(b)(1)(E).

If it becomes necessary, the ALJ may utilize his statutory powers to issue a subpoena under K.S.A. 44-551(i)(1) to compel the hospital to make available to respondent the original sample for further testing pursuant to K.S.A. 2011 Supp. 44-501(b). However, this may raise questions regarding the required chain of custody of the original sample.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[2] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

This matter is reversed and remanded to the ALJ for further proceedings consistent with the above Order. The Board does not retain jurisdiction of this matter.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated June 7, 2012, is reversed and the matter remanded to the ALJ for further proceedings pursuant to the above Order.

[2] K.S.A. 2011 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
galbin@kbafirm.com
trod@kbafirm.com

William L. Townsley, Attorney for Respondent and its Insurance Carrier
wtownsley@fleeson.com
pwilson@fleeson.com

Thomas Klein, Administrative Law Judge